Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000653-001 DT 04/27/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA ALISON FERRANTE

v.

CORY ANDREW PAYNE (001) CARRIE M SPILLER

GILBERT MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 2010–CT–11116.**

Defendant-Appellee Cory Payne (Defendant) was charged in Gilbert Municipal Court with driving under the influence, driving under the extreme influence, and failing to stop leaving a driveway. The State contends the trial court erred in granting Defendant's Motion To Suppress, which alleged the officer interfered with his right to consult with an attorney prior to deciding whether to take a BAC test. For the following reasons, this Court vacates the decision of the trial court.

I. FACTUAL BACKGROUND.

On June 6, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28–1382(A)(1); and failing to stop leaving a driveway, A.R.S. § 28–856(1). Prior to trial, Defendant filed a Motion To Suppress/Dismiss alleging: (1) The officer did not have reasonable suspicion to stop Defendant's vehicle; (2) seizing Defendant violated his rights under the Fourth Amendment; (3) the officer subjected Defendant to custodial interrogation without giving him the *Miranda* warnings; (4) the officer interfered with Defendant's right to consult with an attorney prior to deciding whether to take the BAC test; and (5) Defendant's statements were involuntary.

At the hearing on Defendant's motion, Officer James Lefler was the only witness who testified. (R.T. of June 17, 2011, at 4.) He testified he was on duty on June 6, 2010, assigned to the nighttime DUI squad. (*Id*. at 5.) At 12:49 a.m., he was at the intersection of Val Vista Road and Ray Road when he saw a vehicle leave the parking lot of a bar called the Field House and enter Val Vista Road without stopping. (*Id*. at 5–7, 28, 50.) Officer Lefler initiated a traffic stop

and spoke to the driver, whom he identified as Defendant. (*Id*. at 7, 28–30.) Officer Lefler noted the odor of alcohol coming from the window of the vehicle, and that Defendant's eyes were bloodshot and watery. (*Id*. at 9, 31.) Defendant initially denied drinking any alcohol, but after performing some tests admitted he had been drinking. (*Id*. at 9.) As Officer Lefler accompanied Defendant to the sidewalk, he noticed the odor of alcohol coming from Defendant. (*Id*. at 9–10.) Officer Lefler had Defendant perform an HGN test, and Defendant showed six cues of impairment. (*Id*. at 10, 13.) Officer Lefler had Defendant perform some field sobriety tests, and again Defendant showed signs of impairment. (*Id*. at 14–16.) At 12:57, Officer Lefler placed Defendant under arrest. (*Id*. at 17–18, 34, 50.)

Once Officer Lefler placed Defendant under arrest, he read him the *Miranda* warnings and had him transported to the police station. (R.T. of June 17, 2011, at 18, 34.) After they arrived at the police station, at 1:23 a.m. Officer Lefler read to Defendant the Admin Per Se Affidavit. (*Id*. at 19, 36.) Officer Lefler asked Defendant if he would submit to a BAC test, and Defendant asked, "Can I talk to a lawyer?" (*Id*. at 19, 36.) Officer Lefler responded in the affirmative, and at 1:24 a.m., had him go into the telephone room, which has two telephones and two telephone books, and a large window. (*Id*. at 19–20.) Officer Lefler instructed Defendant on how the telephones operated, and told him he could make as many calls as he wanted. (*Id*. at 19, 36.) Officer Lefler left Defendant in the telephone room and went to a computer terminal to do some other paperwork. (*Id*. at 20.)

At 1:30 a.m., Officer Lefler looked through the window and saw Defendant standing by the door and not making any telephone calls, so he re-contacted him. (R.T. of June 17, 2011, at 20, 37.) Officer Lefler asked Defendant if he would submit to the blood test, and Defendant said, "I refuse." (*Id*. at 20.) At no point did Defendant say he needed more time to contact an attorney, nor did he say he was waiting for a call back from an attorney. (*Id*. at 51.) Officer Lefler did not ask Defendant if he had been able to contact an attorney. (*Id*. at 37, 38.) Officer Lefler told Defendant if he continued to refuse, his next step would be to attempt to obtain a search warrant. (*Id*. at 20–21.) Officer Lefler did not deem Defendant to have refused at that point. (*Id*. at 46.) Officer Lefler told Defendant if a search warrant was issued, his blood would be drawn without his consent. (*Id*. at 21.) Officer Lefler then left Defendant in the telephone room. (*Id*. at 21.)

At 1:37 a.m., Officer Lefler began drafting the affidavit for a search warrant. (R.T. of June 17, 2011, at 21, 39.) There was some confusion whether Officer Lefler faxed the affidavit before or after he re-contacted Defendant the second time because there was one time stamp for 1:48 a.m. and one time stamp for 1:53 a.m. (*Id*. at 22–23, 41, 43.) Officer Lefler thought 1:48 a.m. was the time the affidavit was scanned into the fax machine, and 1:53 a.m. was the time it was actually transmitted to the IA court. (*Id*. at 52.)

At 1:50 a.m., Officer Lefler again saw Defendant standing by the door and not making any telephone calls, so he went back into the telephone room. (R.T. of June 17, 2011, at 21.) Officer Lefler again read to Defendant the portion of the Admin Per Se Affidavit pertaining to further

delays and asked him if he would take the blood test, and Defendant replied, "No." (*Id*. at 22.) Again, at no point did Defendant say he needed more time to contact an attorney, nor did he say he was waiting for a call back from an attorney. (*Id*. at 53.) Officer Lefler asked Defendant if he was through making telephone calls, and Defendant said he was. (*Id*. at 37–38, 43, 52.) At this point, Officer Lefler deemed Defendant to have refused to take the test. (*Id*. at 46.) Officer Lefler again left Defendant in the telephone room and continued dealing with the search warrant. (*Id*. at 22.) Because Officer Lefler left Defendant in the telephone room, Defendant could have been making more telephone calls until Officer Lefler served the warrant on Defendant, which was at 2:15 a.m. (*Id*. at 53.) Officer Lefler said that, if Defendant ever had recanted and said he would take the blood test voluntarily, he would have accepted that recantation. (*Id*. at 45, 46.)

The IA court sent the search warrant back to Officer Lefler at 2:13 a.m., and Defendant's blood was obtained at 2:18 a.m. (R.T. of June 17, 2011, at 23, 47.) Officer Lefler did not ask Defendant any interview questions, and instead released him. (*Id*. at 24.)

After Officer Lefler finished testifying, the trial court denied Defendant's motions based on the claims that (1) Officer Lefler did not have reasonable suspicion to stop Defendant's vehicle; (2) seizing Defendant violated his rights under the Fourth Amendment; (3) Officer Lefler subjected Defendant to custodial interrogation without giving him the *Miranda* warnings; and (4) Defendant's statements were involuntary. (R.T. of June 17, 2011, at 66–68.) For Defendant's claim that Officer Lefler interfered with his right to consult with an attorney, the trial court made the following findings of fact for a time line:

1. 12:49 a.m., stop.
2. 12:57 a.m., arrest (8 minutes later).
3. 1:23 a.m., Admin Per Se read.
4. Immediate unequivocal request to speak with an attorney.
5. 1:24 a.m., placed in telephone room with telephone and telephone books.
6. 1:30 a.m. (6 minutes later), Officer returned and asked if Defendant would take test.
7. Defendant unequivocally said, "I refuse."
8. 1:37 a.m., Officer began drafting warrant affidavit.
9. 1:48 a.m., Officer faxed warrant affidavit.
10. 1:50 a.m., Officer again contacted Defendant, advised about further delays per Admin Per Se.
11. Defendant again refused to take blood test.
12. 2:18 a.m., blood draw.

(R.T. of June 17, 2011, at 68–69.) The trial court said it did not know whether Defendant (1) attempted to make a telephone call, (2) was waiting for a return telephone call, (3) wanted more information, or (4) just decided not to make any telephone calls. (*Id*. at 69.) The trial court then made the following statements:

> What I can say is that the time between 1:24 when he was placed in the cell and 1:30 when he was required to make a decision as to whether or not to take a test is not enough time for a person to consult an attorney.

(*Id*.)

> If there had been evidence that at 1:54—or 1:50 or 2:18 or at anytime, the Defendant was asked, are you done making your phone calls. Even at 6 minutes into the episode if he had said, yeah, I'm done making the phone calls, then there is no issue. I don't know if he was done making his phone calls. I don't know if he was waiting for phone calls to return. Either inquiring about whether or not he was done or waiting a bit further would have remedied that.

(*Id*. at 70.) The trial court then granted Defendant's motion and ordered suppression. (*Id*.) On June 22, 2011, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ERR IN GRANTING DEFENDANT'S MOTION TO SUPPRESS.

The State contends the trial court erred in finding the State had violated Defendant's right to consult with an attorney, and therefore erred in granting Defendant's Motion To Suppress. In order to determine whether the State violated Defendant's right to consult with an attorney, it is necessary to determine to what extent Defendant had a right to an attorney.

1. *The Sixth Amendment to the United States Constitution.*

In Defendant's Motion To Suppress/Dismiss, he contended the State violated his right to counsel under the Sixth Amendment to the United States Constitution. The Sixth Amendment grants to a defendant the right to counsel as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [*sic*].

U.S. CONST. amend 6. The United States Supreme Court has made it clear, however, the Sixth Amendment right to counsel does not attach until after the initiation of formal charges:

> The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel.

*Davis v. United States*, 512 U.S. 452, 456–57 (1994) (citations omitted); *accord, Montejo v. Louisiana*, 556 U.S. 778, ___ 129 S. Ct. 2079, 2085 (2009) ("[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings."); *Moran v. Burbine*, 475 U.S. 412,

431 (1986) ("[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges."); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"), *quoting Kirby v. Illinois*, 406 U.S. at 682, 689 (1972); *Massiah v. United States*, 377 U.S. 201, 205 (1964); *State v. Martinez*, 221 Ariz. 383, 212 P.3d 75, ¶ 11 (Ct. App. 2009) ("The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated.' "), *quoting Fellers v. United States*, 540 U.S. 519, 523 (2004).

In the present matter, the State did not file any charges against Defendant until after the events in question took place. Thus, at the time of these events, Defendant's right to counsel under the Sixth Amendment had not yet attached, so Officer Lefler could not have violated Defendant's right to an attorney under the Sixth Amendment of the United States Constitution.

2. *Article 2, Section 24, of the Arizona Constitution.*

In Defendant's Motion To Suppress/Dismiss, he contended the State violated his right to counsel under Article 2, Section 24, of the Arizona Constitution. Article 2, Section 24, grants to a defendant the right to counsel as follows:

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

ARIZ. CONST. art. 2, § 24. Although this Court is not aware of any case that holds this right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges, in *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (Ct. App. 1996), the court stated as follows:

> We have been unable to locate any authority for appellee's assertion that Arizona's right to counsel is broader than the federal right. Where, as here, the language of the federal and state constitutional provisions are substantially similar, we will use the same standard to analyze both provisions.[2]
>
> [2] *Compare* U.S. Const. amend. VI ("the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.") *with* Ariz. Const. art. 2, § 24 ("the accused shall have the right to appear and defend in person, and by counsel . . .").

186 Ariz. at 485 & n.2, 924 P.2d at 489 & n.2. Because (1) both the Sixth Amendment and Article 2, Section 24, use the term "the accused," and (2) both provisions contain essentially the

same rights, and (3) the provisions in Article 2, Section 24, describe events that happen after the State has charged a defendant in a criminal matter, this Court concludes a defendant's right to counsel under Article 2, Section 24, of the Arizona Constitution does not attach until after the initiation of formal charges. Again, in the present matter, the State did not file any charges against Defendant until after the events in question took place. Thus, at the time of these events, Defendant's right to counsel under Article 2, Section 24, had not yet attached, so Officer Lefler could not have violated Defendant's right to an attorney under Article 2, Section 24.

3. *Miranda v. Arizona and the Fifth Amendment to the United States Constitution.*

In Defendant's Motion To Suppress/Dismiss, he contended the State violated his right to counsel under the Fifth Amendment to the United States Constitution and *Miranda v, Arizona*, 384 U.S. 436 (1966). The Fifth Amendment to United States Constitution does not grant to a defendant the right to an attorney, but instead provides a defendant has the right to remain silent:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

U.S. CONST. amend 5. In *Miranda*, the Court held that "the right to have counsel present at the ***interrogation*** is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." 384 U.S. at 469 (emphasis added). The Court has made it clear, however, the right to an attorney under *Miranda* is not a constitutional right to counsel, but is instead a safeguard to protect the Fifth Amendment right to remain silent:

> [W]e held in *Miranda* that a suspect subject to ***custodial interrogation*** has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a "series of recommended 'procedural safeguards' . . . [that] ***were not themselves rights protected by the Constitution*** but were instead measures to insure that the right against compulsory self-incrimination was protected."

*Davis*, 512 U.S. at 457 (1994) (citations omitted, emphasis added). The Court in *Miranda* stated the holding as follows:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from ***custodial interrogation*** of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By ***custodial interrogation,*** we mean ***questioning*** initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, . . . the following measures are required. ***Prior to any questioning,*** the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

384 U.S. at 444 (footnote omitted, emphasis added). The Court thus made clear these rights, including the right to counsel, applied only when the suspect was subjected to "custodial interrogation," which meant questioning while in custody. Because Defendant was not subjected to "custodial interrogation," he did not even have the right to *Miranda* warnings, and thus there could have been no violation of his right to counsel under *Miranda.*

Moreover, the Court has held *Miranda* and the derivative right to counsel did not apply to the taking of a suspect's blood. One week after it had decided *Miranda,* the Court in *Schmerber v. California,* 384 U.S. 757 (1966), made clear the taking of a suspect's blood, even against the suspect's wishes, was not testimonial, and thus the Fifth Amendment and *Miranda* did not apply:

> Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege [against self-incrimination] grounds.
>
> This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege [against self-incrimination], he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

384 U.S. at 765–66 (footnote omitted); *accord, South Dakota v. Neville,* 459 U.S. 553, 554 (1983) ("*Schmerber* held that a State could force a defendant to submit to a blood-alcohol test without violating the defendant's Fifth Amendment right against self-incrimination."). As a result, Arizona has held *Miranda* warnings are not required prior to asking a suspect to submit to a BAC test:

> "*Miranda* is not applicable to evidence obtained from a breathalyzer test since *Miranda* is 'bottomed on the privilege against self-incrimination and bars the use of communications by or testimonial utterances of a person unless and until the four-fold warning has been given and applied. A breathalyzer test is unrelated to a communication by the subject.'"
>
> . . . .
>
> Accordingly, we hold that *Miranda* warnings were not required prior to requesting that defendant submit to the intoxilyzer test.

*State v. Lee*, 184 Ariz. 230, 233–34, 908 P.2d 44, 47–48 (Ct. App. 1995) (citations omitted). Because Defendant had no federal constitutional right to consult with an attorney prior to taking the BAC test, Officer Lefler could not have violated Defendant's right to an attorney under *Miranda*.

4. *Rule 6.1(a) of the Arizona Rules of Criminal Procedure.*

In Defendant's Motion To Suppress/Dismiss, he contended the State violated his right to counsel under Rule 6.1(a) of the Arizona Rules of Criminal Procedure. The Arizona Supreme Court has promulgated rules of criminal procedure, which provide in part as follows:

> A defendant shall be entitled to be represented by counsel in any criminal proceeding . . . . The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

Rule 6.1(a), ARIZ. R. CRIM. P. It was this rule the trial court found the State violated. In order to determine whether there was a violation of this rule, it is necessary to determine the basis for this rule.

Because the first sentence of that rule provides a "defendant shall be entitled to be represented by counsel in any criminal proceeding," it appears to be referring to the period after the State has initiated formal charges because a suspect does not become a "defendant" until the State has initiated formal charges, and the criminal proceedings do not begin until the State has initiated formal charges. As such, the first sentence of that rule is nothing more than a recognition of the Sixth Amendment right to counsel.

The problem with this rule is the second sentence, which provides it "include[s] the right to consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody." If this is referring to the period before State has initiated formal charges, it is not a restatement of the Sixth Amendment because, as discussed above, the Sixth Amendment right to counsel does not attach until State has initiated formal charges. And if it is not the Sixth Amendment right to counsel, the question then is, from where is this right to counsel derived?

One possibility is the Arizona Supreme Court promulgated this rule, and because the Arizona Supreme Court is the Arizona Supreme Court, it has the power to create this right to counsel. The problem with this explanation is the right to an attorney is a substantive right, and the Arizona Supreme Court does not have the power to create substantive rights:

> A. The supreme court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. ***The rules shall not abridge, enlarge or modify substantive rights of a litigant.***

A.R.S. § 12–109(A) (emphasis added), *accord, State v. Birmingham,* 95 Ariz. 310, 316, 390 P.2d 103, 107 (1964). Providing that a defendant may "consult in private with an attorney . . . as soon as feasible after [arrest]" would be a permissible **procedural** rule if a defendant's **substantive** right to counsel attached at the point of arrest, but as discussed above, the Sixth Amendment right to counsel does not attach until State has initiated formal charges:

> Counsel for appellant urges that adversary proceedings were initiated against appellant at the point of arrest and therefore the denial of his right to counsel at the showup identification is in violation of his sixth amendment constitutional guarantees. An arrest is not the equivalent of the initiation of criminal prosecutions; therefore, a right to counsel argument is inapposite. In appellant's case there had not yet been a complaint filed, nor a preliminary hearing, nor an indictment. Appellant relies heavily on *Moore v. Illinois,* but there a complaint had been filed and, under state law, the initiation of adversary judicial proceedings was commenced upon the filing of such a complaint. We apply the long-standing rule in Arizona to this case: "The law is quite clear in this area that pre-indictment lineups and showups are not a critical stage of the proceedings requiring the presence of counsel (citations omitted)."

*State v. Tresize,* 127 Ariz. 571, 575, 623 P.2d 1, 5 (1980) (citations omitted).

This right to counsel established in Rule 6.1(a) appears instead to be a procedural safeguard that is not in itself a right protected by the Constitution, but instead a measure to insure the due process right to gather exculpatory evidence is protected, as explained by the Arizona Supreme Court in *State v. Moody,* 208 Ariz. 424, 94 P.3d 1119 (2004), a case in which Moody was convicted of first-degree murder and sentenced to death. Moody was arrested in California and extradited to Arizona. *Id* at ¶ 11. Shortly after he arrived in Arizona, detectives served a search warrant on him seeking "physical characteristics" and handwriting samples. *Id* at ¶ 61. Moody asked for an attorney, but the detectives denied his request, and Moody then gave hair, blood, and handwriting samples, and the detectives fingerprinted and photographed him. *Id*. Moody was then indicted. *Id* at ¶ 12. On appeal, Moody claimed the detectives violated his rights under the Sixth Amendment and Rule 6.1(a). The Arizona Supreme Court held there was no Sixth Amendment violation because that only extends to "all critical stages of the criminal process," and the taking of non-testimonial physical evidence is not a critical stage of the proceedings. *Id* at ¶ 65.

The court then explained why there was no violation of Rule 6.1(a):

> Second, Moody argues that by refusing his custodial request to speak with counsel before the taking of the physical evidence, the State interfered with his rule-based "right of access to counsel" and that the evidence should therefore have been suppressed. Rule 6.1(a) of the Arizona Rules of Criminal Procedure provides a criminal defendant with the right to "consult in private with an attorney . . . as soon as feasible after [being] taken into custody." This court has stated that, regarding a suspect in custody, the state may deny the right to consult with an attorney "only when the

exercise of that right will hinder an ongoing investigation." *Kunzler v. Pima County Superior Court.* Although the State has not shown that counsel would have hindered the investigation in this case, Moody had not been assigned an attorney when the warrant was served. This court has also stated that "[i]f the defendant is indigent and cannot afford an attorney, the state need not wait until one is appointed before continuing its detention procedures." *McNutt v. Superior Court.* The taking of the fingerprint evidence would clearly qualify under this exception for detention procedures.

Even if this court were to conclude that Moody's right to consult counsel under Rule 6.1(a) was violated for the other evidence, however, Moody fails to demonstrate that suppression would be required. Federal jurisprudence is clear that if evidence could have been obtained despite the violation of right to counsel, there is no reason to keep that evidence from the jury. *Nix v. Williams.* For suppression to be appropriate, there must be a nexus between the violation and the evidence seized. *Id*. (stating that the exclusionary rule requires the suppression of evidence gained as a result of a government violation of a defendant's rights). In Moody's case, the physical evidence was seized pursuant to a valid warrant, and the samples would have been collected whether or not Moody had an opportunity to speak with an attorney. Consequently, the nexus between the alleged violation and the evidence seized is absent; therefore, the policies underlying the exclusionary rule would not require suppression of this evidence.

Moody relies on a line of cases based on Rule 6.1 of the Arizona Rules of Criminal Procedure for the proposition that a defendant has the right to confer with counsel before taking a test for physical evidence. Those cases, however, all involve and are limited to the seizure of evidence of intoxication. *See, e.g., Kunzler*; *Holland*; *McNutt*; *Rosengren.* Only in these cases has the reviewing court either dismissed the charges against the defendant or affirmed suppression of non-testimonial, physical evidence as a sanction for the state's violation of a defendant's rights under Rule 6.1(a).

These cases addressed violations of Rule 6.1 in the context of impaired drivers. *See Kunzler*; *Holland*; *McNutt*; *Rosengren* (manslaughter). Such investigations raise unique concerns that justify exemption from the general rule:

> In a D[U]I investigation, it is crucial for both the state and the defendant to gather evidence relevant to intoxication close in time to when the defendant allegedly committed the crime. Otherwise, any alcohol that may have been in the blood will have decomposed before the blood can be tested.

*McNutt,* 133 Ariz. at 10 n. 2, 648 P.2d at 125 n. 2. As the court suggested in *McNutt*, DUI investigations are unique because of the evanescent nature of blood- and breath-alcohol evidence. Thus, these DUI cases establish the required nexus between the violation and remedy: Denial of counsel may deprive a defendant of an opportunity to obtain exculpatory evidence and therefore justifies suppression of evidence.

> Moody's case differs in that the physical evidence taken from him was not subject to disappearing or dissipating as is breath- or blood-alcohol evidence. The officers made it clear that the warrant sought only non-testimonial evidence and that they would not be asking Moody any questions regarding the murders while taking the evidence. Additionally, because the evidence was seized pursuant to a valid warrant, it is unlikely that an attorney would advise Moody to defy the warrant and refuse to submit to the search. For those reasons, we agree with those courts that have held that the necessity for counsel was minimized. *E.g., Nix*. Consequently, even if Rule 6.1(a) requires that a defendant be afforded the opportunity to contact counsel before administration of a search warrant for physical characteristics, Moody has failed to demonstrate why suppression would be appropriate in this case. He therefore has not shown that the trial court abused its discretion in denying his motion to suppress the physical evidence.

*Moody* at ¶¶ 66–70 (citations omitted). The Arizona Supreme Court thus held that Moody, who was convicted of first-degree murder and received the death penalty, had no right "to consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody," while a person arrested for DUI does have that right. It thus appears this right to consult with an attorney as soon as feasible after being taken into custody is not a component of any specific grant of a right to counsel, but instead is a procedure provided to ensure a defendant who is arrested for DUI is able to exercise a due process right to gather exculpatory evidence before it disappears. As stated by the Arizona Court of Appeals:

> Appellee also correctly asserts that a right to counsel component is contained within Arizona's constitutional Due Process Clause. The right to counsel is an extension of the doctrine that defendants have the right to gather independent exculpatory evidence. Arizona's Due Process Clause guarantees DUI suspects "a fair chance to obtain independent evidence of sobriety essential to his defense at the only time it [is] available." *Montano v. Superior Court.* Numerous Arizona cases have found due process violations where police conduct interfered with a defendant's right to gather evidence of sobriety before the evidence naturally dissipates. The right to a fair chance to gather exculpatory evidence includes reasonable access to counsel.

*Transon,* 186 Ariz. at 485, 924 P.2d at 489 (citations omitted).

Based on that rule, the Arizona Supreme Court has held a suspect has the right to consult with an attorney prior to deciding whether to take a BAC test, provided that consultation does not disrupt an ongoing investigation by the police. *State v. Juarez,* 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989). The Arizona Supreme Court did not, however, explain how this right to counsel, which was needed to protect a suspect's due process right to obtain exculpatory evidence, morphed into a right to counsel to assist a suspect in determining whether to refuse to comply with the statutory requirement to submit to a BAC test under the implied consent statute. And it seems contrary to the holding in *Schmerber* that a suspect does not have a federally

guaranteed right to counsel when the state forces a suspect to give a blood sample. But that is what the Arizona Supreme Court has said the procedure is and that is the procedure the lower courts must follow.

The question then is whether the State violated any of Defendant's rights under these various procedures. The right to consult with an attorney prior to deciding whether to take a BAC test is not self-effectuating, and instead comes into effect only when a defendant asserts the right to an attorney:

> [A]ppellee's right to counsel [under Rule 6.1(a)] cannot be infringed upon unless appellee actually asks for an attorney.

*Transon,* 186 Ariz. at 486, 924 P.2d at 490. Although the Arizona courts have not stated what level of certainty is required for a suspect to be considered as asking for an attorney under Rule 6.1(a), the Arizona courts have required an unambiguous request before a suspect is to be considered as asking for an attorney under *Miranda. E.g., State v. Ellison,* 213 Ariz. 116, 140 P.3d 899, ¶¶ 25–29 (2006) (defendant said, "I think I might want an attorney"; court held this was equivocal request for counsel, thus detectives were not required to stop questioning him; trial court did not err in admitting statements); *State v. Eastlack,* 180 Ariz. 243, 250–51, 883 P.2d 999, 1006–07 (1994) (court held defendant's statement, "I think I better talk to a lawyer first," was not a clear request for attorney, so the police were permitted to continue questioning defendant); *State v. Zinsmeyer,* 222 Ariz. 612, 218 P.3d 1069, ¶¶ 5–11 (Ct. App. 2009) (during interview, defendant told detectives, "[I t]hink I need a lawyer," and when they did not respond, asked them, "Do I need a lawyer"; court concluded this was not unambiguous request for counsel, thus trial court did not abuse discretion in finding defendant had not invoked right to counsel); *State v. Gay,* 214 Ariz. 214, 150 P.3d 787, ¶¶ 30–33 (Ct. App. 2007) (after officers told defendant court would appoint attorney for him at hearing next day if he could not afford one, defendant asked, "But would I get an attorney anyway?"; court held this was not unambiguous invocation of *Miranda* rights, thus officers were permitted to question him). These cases followed *Davis v. United States,* 512 U.S. 452 (1994), which held Davis's statement, "Maybe I should talk to a lawyer," was not a clear and unambiguous request for an attorney, thus officer were permitted to question Davis and were not required first to ask clarifying questions. 512 U.S. at 459–61.

In the present case, when Officer Lefler read to Defendant the Admin Per Se Affidavit and asked if he would submit to a BAC test, Defendant asked, "Can I talk to a lawyer?" (R.T. of June 17, 2011, at 19, 36.) The trial court considered this to be an "unequivocal request to speak with an attorney." (*Id*. at 68, line 15.) In light of the cases cited above, it is questionable whether this was an unequivocal request sufficient to trigger the right to counsel under Rule 6.1(a).

Nonetheless, Officer Lefler immediately placed Defendant in the telephone room at 1:24 a.m., and thus did not interfere with Defendant's ability to contact an attorney. Although Officer Lefler spoke to Defendant at 1:30 a.m. and at 1:50 a.m., he left Defendant in the telephone room until he served the search warrant at 2:15 a.m. (R.T. of June 17, 2011, at 53.) De-

fendant therefore had over 50 minutes to contact an attorney. It thus appears Officer Lefler did not interfere with Defendant's ability to contact an attorney.

Although the trial court found Officer Lefler did interfere with Defendant's ability to contact an attorney, the trial court stated that, if at 1:50 or 2:18 or at any time Defendant said he was done making phone calls, there would be no issue. (R.T. of June 17, 2011, at 70, ll. 12–16.) But Officer Lefler had testified that, at 1:50 a.m., he asked Defendant if he was done making telephone calls, and Defendant said he was:

> Q. And what did he say when you asked him if he was done making the phone calls?
>
> A. He said he was.

(*Id*. at 52, ll. 4–6; see also *id* at 37–38, 43.) Thus, under the trial court's own reasoning, "there is no issue." (*Id*. at 70, line 16.)

The basis for the trial court's decision appears to be its conclusion that Defendant only had 6 minutes to decide whether to take the BAC test:

> What I can say is that the time between 1:24 when he was placed in the cell and 1:30 when he was required to make a decision as to whether on not to take a test is not enough time for a person to consult an attorney.

(R.T. of June 17, 2011, at 69, ll. 9–12.) But the record shows Officer Lefler did not consider Defendant's response at 1:30 a.m. to be the final word on the subject. The reason Officer Lefler reentered the telephone room was he saw Defendant standing there not using the telephone. (*Id*. at 20, 37.) Officer Lefler did ask Defendant if he would submit to the blood test, and Defendant did say, "I refuse," but Officer Lefler did not deem Defendant to have refused at that point. (*Id*. at 20, 46.) Officer Lefler told Defendant if he continued to refuse, his next step would be to attempt to obtain a search warrant, and then left Defendant in the telephone room. (*Id*. at 20–21.) Defendant thus had from 1:30 a.m. until 2:15 a.m. when the search warrant was served to contact an attorney and ask whether it was a good idea to refuse to take the test. Because Defendant had 45 minutes here to talk to an attorney, Officer Lefler's actions could not be considered to be interfering with Defendant's right to consult with an attorney.

The trial court appears to be under the impression that a refusal to take a BAC test is a prerequisite to obtaining a search warrant, thus because Officer Lefler began drafting the affidavit at 1:37 a.m., Officer Lefler must have deemed Defendant's statement at 1:30 a.m. as Defendant's final word. But the refusal to take a BAC test is not a prerequisite to obtaining a search warrant:

> The primary issue on appeal is whether the implied consent statute, A.R.S. § 28–1321, mandates that a search warrant for a blood test must be based on an affidavit setting forth that the defendant has refused to give consent to the test. . . .
>
> . . . .

> Search warrants may be authorized "[w]hen property or things to be seized . . . constitute any evidence which tends to show that a particular public offense has been committed, or tends to show that a particular person has committed the public offense." A.R.S. § 13–3912(4) (2001). The blood identified by the affidavit clearly meets that standard. Additionally, the statute requires that "[n]o search warrant shall be issued except on probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched." A.R.S. § 13–3913 (2001). The affidavit here likewise meets that requirement. ***A refusal to take a test,*** though required to administratively revoke one's driver's license pursuant to A.R.S. § 28–1321, ***is not a requirement to the issuance of a search warrant in support of aggravated DUI.***

*State v. Stanley*, 217 Ariz. 253, 172 P.3d 848, ¶¶ 9, 22 (Ct. App. 2007) )emphasis added). Thus, Officer Lefler's drafting of the search warrant affidavit at 1:37 a.m. did not establish that Defendant's statement was an irrevocable refusal to take the BAC test. Officer Lefler testified that, as far as he was concerned, Defendant could have changed his mind at any time up until the search warrant was served, which was at 2:15 a.m. Defendant therefore had 45 minutes from 1:30 a.m. until 2:15 a.m. to consult with an attorney. Officer Lefler thus did not interfere with Defendant's right to consult with an attorney, and the trial court therefore erred in granting Defendant's motion to suppress the results of the State's test of Defendant's blood.

Moreover, even if Defendant's statement at 1:30 a.m. were considered either as a matter of law or a matter of fact as an irrevocable refusal to take the BAC test and thus the 6 minutes between 1:24 a.m. and 1:30 a.m. was not a sufficient amount to time to make that decision, for three reasons that still would not require the suppression of any evidence. First, as discussed above, the underlying purpose of the right to consult with counsel under Rule 6.1(a) is to provide a suspect with the assistance of counsel in obtaining exculpatory evidence, such as an independent BAC test, or other physical evidence, such as a videotape showing how the suspect acted. Even if Defendant's refusal were considered a done deal at 1:30 a.m., Defendant still had another 45 minutes until 2:15 a.m. to contact and attorney in an attempt to obtain some exculpatory evidence, assuming any such evidence were available. Second, if Defendant had consulted with an attorney, that attorney either would have told him to continue to refuse and make the State get a search warrant (which is what the State did here), or would have told him to agree to take the blood test. In either event, the State would have obtained a sample of Defendant's blood. And third, suppression is required only if there is some nexus between the violation and the evidence obtained. *State v. Ramsey*, 225 Ariz. 374, 238 P.3d 642, ¶ 16 (Ct. App. 2010). As discussed above, refusal to take a BAC test is not a prerequisite to obtaining a search warrant. *Stanley* at ¶ 22. Eliminating from the affidavit the information that Defendant refused to take the BAC test thus would not have vitiated the search warrant, thus there was no nexus between Defendant's refusal to take the BAC test and the State's obtaining Defendant's blood pursuant to the search warrant. The trial court therefore erred in granting Defendant's motion to suppress the results of the State's test of Defendant's blood.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred in granting Defendant's motion to suppress the results of the State's test of Defendant's blood.

**IT IS THEREFORE ORDERED** vacating the decision of the Gilbert Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Gilbert Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

*/s/ Crane McClennen*
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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